GANA MUTHUSAMY

v.

TETUAN LM ONG & CO

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: J-04-61-97]
2 MAY 1998

LEGAL PROFESSION: *Professional discipline - Misconduct - Appropriation of moneys for purpose other than purpose for which it was paid - Whether amounts to conduct unbecoming of an advocate and solicitor*

LEGAL PROFESSION: *Professional discipline - Misconduct - Issue of whether particular conduct is unprofessional - Whether court can readily interfere with decision of disciplinary committee - When can court do so*

CIVIL PROCEDURE: *Appeal - Appeal against High Court decision under s. 103E Legal Profession Act 1976 - Whether appeal lies to Court of Appeal or Federal Court*

The appellant, an advocate and solicitor, represented the landlord of certain premises in an action commenced in the Sessions Court. While that action was still pending, the tenant in the said premises, through the respondents in this appeal, paid to the appellant a sum of money as payment for rental. The appellant, however, treated this payment as payment of mesne profits and despite protests raised by the respondents, the appellant refused to yield. The respondents complained to the Bar Council. The appointed disciplinary committee inquired into the matter and found the appellant guilty of conduct unbecoming of an advocate and solicitor. The appellant unsuccessfully appealed to the High Court and now appealed to this court. The appellant's only contention was that he was merely guilty of an error of judgment not amounting to professional misconduct.

One other point which this court by its own discernment raised was whether it had jurisdiction to entertain appeals under s. 103E of the Legal Profession Act 1976 against a decision of the High Court.

Held:
Per Gopal Sri Ram JCA

[1] It is beyond comprehension how the appellant could have deemed it proper to appropriate the payment in question as mesne profits in the absence of a finding by the Sessions Court in the landlord's favour. Such conduct left no room for the suggestion that it was a mere error of judgment on his part.

[2] It is primarily for the members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether a particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise, it will be the court and not the profession which will determine the yardstick of professional behaviour. A court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of that profession.

[3] Section 103E of the Legal Profession Act 1976 provides that any person aggrieved by a decision of the High Court shall have the right to appeal to the Supreme Court within one month of the decision. In 1994, when this court was established by the Federal Constitution, the Courts of Judicature Act 1964 was amended in relation to appeals from the High Court. The amending legislation also provided that references in the Federal Constitution to the Supreme Court were to be to the newly established Federal Court. The Legal Profession Act 1976 was not, however, amended. Hence, it may be argued that appeals against the decisions of the High Court under s. 103E of the Legal Profession Act 1976 now lie, not to this court, but directly to the Federal Court.

[Appeal dismissed.]

Legislation referred to:
Legal Profession Act 1976, s. 103E

Other source referred to:
Guide to the Professional Conduct of Solicitors, Council of the Law Society 1974

For the appellant - N Chandran (R Jayabalan with him); M/s Gana Muthusamy & Co
For the respondent - Serene Ong; M/s LM Ong & Co

[Appeal from High Court, Johor Bahru; Civil Appeal No: 12-36-1992]

[Editor's note: The CLJ has been advised that the instant decision of the Court of Appeal reported hereinbefore has been set aside for want of jurisdiction, and that leave has been granted to the appellant to file his notice of appeal to the Federal Court. Federal Court, Civil Application No: 08-19 of 1998.]

Reported by S Dharmendran

JUDGMENT

Gopal Sri Ram JCA:

The appellant is an advocate and solicitor. He was found guilty of misconduct unbecoming of an advocate and solicitor by the disciplinary committee. He appealed to the High Court. His appeal was dismissed. He then appealed to this court. We heard his appeal on 16 February 1998 and dismissed it. The reasons for our decision are as follows.

The facts relevant to this appeal are not in dispute. The appellant practises under the name and style of Gana Muthusamy & Co. At all material times the appellant represented the landlord of certain premises in Johor Baru. The tenant was represented by M/s L.M. Ong & Co, a firm of advocates and solicitors. They are the respondents to this appeal. The landlord commenced an action against the tenant in the Sessions Court. While that action was still pending, the respondents, on 30 March 1989, paid to the appellant a sum of RM520 as rental for the months of April and May 1989. The appellant's receipt, however, treated that sum as payment of mesne profits. So did his letter under the cover of which he sent the receipt to the respondents. There then followed an exchange of correspondence between the parties. The respondents protested at the appellant's appropriation of the sum of RM520 as mesne profits. They took the position that the appellant ought to accept the payment as rent or return it: he could not unilaterally elect to treat it as mesne profits in the absence of a judgment in the landlord's favour. The appellant stood his ground. Later, upon the respondents' complaint, the matter went before the disciplinary committee. After inquiring into the matter, that committee found the appellant was guilty of conduct unbecoming of an advocate and solicitor. It censured the appellant, but made no order as to costs. The High Court, on the appellant's appeal, affirmed the decision of the disciplinary committee.

Before us, Encik Chandran of counsel for the appellant argued that his client was merely guilty of an error of judgment not amounting to professional misconduct. We do not agree.

The respondents sent him the money in question as payment of rental. If the appellant was not minded to receive the payment for the purpose for which it was sent he ought to have rejected it. Instead, he appropriated the money for a purpose other than the purpose for which it was sent. The evidence shows that the appellant had sufficient opportunity to repent and put matters right by refunding the payment to the respondents. Instead, he was adamant in contending that what he had done was entirely proper. It is beyond comprehension how the appellant could have deemed it proper to appropriate the payment in question to account of mesne profits in the absence of a finding by the Sessions Court in the landlord's favour. The appellant's conduct, therefore, leaves no room for the suggestion that there was a mere error of judgment on his part. We consequently find ourselves in agreement with the conclusions of the disciplinary committee and the learned judges of the High Court.

It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the *Guide to the Professional Conduct of Solicitors* issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:

> One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

There is one other point. It was not raised by either side during argument. However, it occurred to us while preparing this judgment in draft. It has to do with whether we had jurisdiction in the first place to entertain this appeal.

Section 103E of the Legal Profession Act 1976 provides that any person aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court within one month of the decision of the High Court. In 1994, when this court was established by the Federal Constitution, the Courts of Judicature Act 1964 was amended in relation to appeals from the High Court. The amending legislation also provided that references in the Constitution to the Supreme Court were to be to the newly established Federal Court. The Legal Profession Act was not, however, amended. Hence, it may be argued that appeals against the decision of the High Court under s. 103E of the Legal Profession Act now lie, not to this court, but directly to the Federal Court. We must therefore express our doubt as to whether this appeal has been properly brought before this court as we may lack jurisdiction to entertain it altogether.

For the reasons already given, the appeal was dismissed. However, we made no order as to costs and directed that the deposit be refunded to the appellant.